Supreme Court, U.S.
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No. 09-1338

In The
Supreme Court of the United States

MARCINE PALKOVIC,

Petitioner,

v.

MICHAEL J. JOHNSON, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, AVERILL PARK CENTRAL SCHOOL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit properly found that it was not precluded from affirming the decision of the United States District Court for the Northern District of New York granting the Respondents summary judgment simply because it had previously found that Petitioner's complaint sufficiently alleged a claim for relief for procedural due process violations where the Court's prior decision expressly declined to reach the issue of whether Petitioner could adduce sufficient evidence to succeed on such a claim.

2. Whether, under the unique circumstances of this case, the United States Court of Appeals for the Second Circuit correctly upheld the decision of the United States District Court for the Northern District of New York granting the Respondents summary judgment and dismissing the Petitioner's complaint on the grounds that the Respondents had produced evidence of Petitioner's mental instability during the third termination proceeding that was not before the first hearing officer and that the Respondents followed all appropriate procedures prior to terminating Petitioner.

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STATEMENT OF THE CASE

This is the Petitioner's last attempt to reverse the thorough and well-reasoned decision of Hearing Officer Dennis Campagna who found that she was mentally unfit to teach. Mr. Campagna reached this decision after a full evidentiary hearing held pursuant to New York Education Law § 3020-a for which the Petitioner was provided notice of the charges and in which she was represented by counsel and given the opportunity to provide witnesses in her defense, including her own psychiatrists. Mr. Campagna credited the psychiatrists who testified on behalf of the Averill Park Central School District ("District") who determined that the Petitioner suffered from a rigid personality disorder in which she lacked the ability to take responsibility for her actions and would be unable to be supervised, among other things.

After losing her appeal of Mr. Campagna's decision to the New York State Supreme Court for Rensselaer County, Petitioner filed a lawsuit in the United States District Court for the Northern District of New York ("District Court") alleging that her procedural due process rights under the XIV Amendment to the United States Constitution were violated. The United States Court of Appeals for the Second Circuit ("Second Circuit") reversed two separate decisions of the District Court dismissing the complaint on procedural issues. Ultimately, the Second Circuit upheld the District Court's decision granting the Respondents summary judgment based

on the full record, finding that the Petitioner's due process rights were not violated.

The narrow issues specific to this case are (1) whether the Second Circuit was precluded from upholding the decision of District Court granting Respondents summary judgment simply because the Second Circuit had previously ruled that the Petitioner's complaint had alleged sufficient facts to state a claim for violations of her procedural due process rights; and (2) whether both the Second Circuit and the District Court properly found that the Petitioner's due process rights were not violated when the Respondents instituted a third termination proceeding against her based on her mental incompetence to teach where the evidence adduced at the third hearing was not introduced or available at the first hearing. Petitioner has not shown that the Courts below failed to follow the precedent of this Court or that their decisions involved an important federal question and a grant of certiorari is not warranted here.

FACTS

This action arises out of the School District's initiation of a proceeding, on June 14, 2000, pursuant to Section 3020-a of the New York Education Law charging Petitioner, a tenured elementary teacher within the School District, with lacking the mental competency to teach based on the examination and

psychiatric testing of Stephen Kronick, M.D. and Frederick Smith, M.D., two psychiatrists retained by the School District. (A. 401-03; A. 405-09).[1] In her complaint, Petitioner contended that the charges were brought improperly and in violation of her due process rights under the 5th and 14th Amendments to the United States Constitution and 42 U.S.C. § 1983. Petitioner argued that the Respondents had no new evidence to support these charges and that the Respondents were bound by an earlier proceeding in which a different hearing officer found that Petitioner was not mentally unfit for teaching. Petitioner contended that the commencement of a new proceeding on the same evidence violated her procedural due process rights.

The facts, however, showed that the School District had just cause to bring additional charges against her having received recent reports from two psychiatrists who examined Petitioner and indicated that she lacked the mental capacity to teach. Petitioner has conceded that the School District had the right to request that she undergo these examinations, but claimed that these examinations did not show that her mental state had changed from the time of the previous hearing. The School District's doctors had not testified in the earlier proceeding, however, and based their examinations of the Petitioner on her

[1] Citations to the Joint Appendix are noted as A; Citations to the Special Appendix are noted as SPA.

behavior and test results in May 2000, and not on the specific allegations raised in the first termination proceeding.

There is also no dispute that, prior to and after receiving those charges, Petitioner acted in a bizarre and threatening manner toward witnesses who testified in the first 3020-a hearing and individuals who had allegedly made certain statements against her over the course of her career. In some instances, she demanded retraction from individuals who had not made statements against her. In others, she used deception and bullying in order to attempt to get retractions. Although Petitioner now attempts to excuse or explain this behavior as acts of desperation by an oppressed individual (Petitioners' Petition at 6-7), Petitioner never testified at this hearing and offered no explanation for this bizarre behavior. Hearing Officer Campagna correctly concluded that this evidence supported the testimony of the School District psychiatrists that Petitioner was not mentally fit to teach. He found that, although this behavior was not evidence of specific misconduct, it was indicative of her personality disorder described by Dr. Kronick. (A. 844). Thus, Hearing Examiner Campagna found that Petitioner suffered from a permanent mental disability that inhibits her ability to "interact with young students, the ability to effectively interact with her peers and the ability to effectively interact with supervisory personnel." (A. 845).

Petitioner also does not dispute that she received timely and adequate notice of the charges against her and that she was given a full and fair opportunity to be heard before a neutral arbitrator. Petitioner was represented by counsel at all stages of the administrative and judicial proceedings and was given ample opportunity to present witnesses and evidence in support of her claims. In fact, Petitioner raised many of these same claims in the proceedings before the recent administrative hearing officer, who found that Petitioner was unfit to teach. She also raised these arguments on appeal of the hearing officer's decision to the New York State Supreme Court which upheld the decision of the hearing officer finding that the decision was based on new evidence and that he was not merely "re-sifting the evidence considered by the prior arbitrators." (A. 1215-16).

PROCEDURAL HISTORY

After unsuccessfully arguing before Hearing Officer Campagna and the New York Supreme Court that the third 3020-a proceeding was improper because the School District had not shown a change in her mental state from the time of the first 3020-a proceeding, Petitioner brought these same claims, now couched as a claim for procedural due process, in a complaint to the District Court. Respondents initially moved to dismiss this complaint on the grounds that the statute of limitations had expired. The District Court granted this motion finding that Petitioner's

cause of action began to accrue when she received notice of the School District's charges against her and was therefore untimely. The Second Circuit reversed finding that the Petitioner's cause of action accrued when she received notice of her termination, which did not occur until, at the earliest, at the time she received Hearing Officer Campagna's decision and her complaint was therefore timely. *Palkovic v. Johnson*, 150 Fed. Appx. 35 (2d Cir. 2005) (*Palkovic I*). The Second Circuit noted that the District Court also appeared to have granted Respondents' motion on the grounds that the complaint failed to state a cause of action. Because this issue had not been fully briefed, the Second Circuit remanded the case to District Court for further proceedings. *Id.*

On remand, the Respondents made a motion to dismiss pursuant to FRCP 12(b)(6). The District Court granted the motion, finding that the third termination proceeding was not a sham hearing and that her due process rights had not been violated. The Second Circuit, looking only at the four corners of the complaint, again reversed finding that Petitioner had raised sufficient facts in her complaint to show that she had not received a meaningful hearing. *Palkovic v. Johnson*, 281 Fed. Appx. 63 (2d Cir. 2008) (*Palkovic II*). The Second Circuit specifically held, however, that it was not reaching the issue of whether Petitioner could succeed on the merits of this claim. *Id.*

The Petitioner then made a motion in District Court for summary judgment based on liability and

the Respondents made a cross motion for summary judgment. The District Court granted the Respondents' motion upon reviewing the full record and not just the allegations of the complaint. The District Court found that new evidence was adduced at the third hearing which showed that Petitioner was mentally unfit to teach. This new evidence included the reports of the School District's psychiatrists who had recently examined Petitioner and as well as testimony about Petitioner's bizarre behavior toward the witnesses in the earlier proceeding. The District Court found that this third hearing was therefore a meaningful hearing and not simply a sham or rehashing of the evidence presented at the first hearing. The Second Circuit agreed and affirmed the District Court's decision. *Palkovic v. Johnson*, 355 Fed. Appx. 513 (2d Cir. 2009) (*Palkovic III*). The Petitioner unsuccessfully moved to reargue the case and then filed the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

The questions presented by the Petition do not involve important constitutional issues or questions of federal law. They also do not represent a conflict between other United States courts of appeals or show a departure from precedent established by this Court. Rather, the issues raised by the Petition are narrowly focused to the facts of this particular case and are not likely to be repeated. Because the Second Circuit's decision is correct and does not deviate from the precedent of this Court the Petition should be

denied. Sup. Ct. R. 10(a); *Yee v. City of Escondido, CA*, 503 U.S. 519, 536 (1992).

I. PETITIONER'S SUCCESSFUL OPPOSITION TO RESPONDENTS' MOTION TO DISMISS DOES NOT PRECLUDE A LATER GRANT OF SUMMARY JUDGMENT TO RESPONDENTS

The Petitioner erroneously contends that because the Second Circuit reversed the District Court's decision dismissing the complaint pursuant to FRCP 12(b)(6), it was inconsistent for the Second Circuit to later affirm the District Court's later decision to dismiss the case on Respondents' motion for summary judgment. The standard of review on Summary Judgment is very different than that of a motion to dismiss. In a motion to dismiss pursuant to FRCP 12(b)(6), the Court looks only at the pleadings themselves to determine whether the Petitioner has pled sufficient facts to support a cause of action. *Palkovic II*, 281 Fed. Appx. at 66. On a motion for summary judgment, on the other hand, the Court looks at the entire record to determine if the undisputed facts support the Petitioner's cause of action. FRCP 56(c); *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir.1999).

It is undisputed that the Respondents' earlier motion to dismiss was not converted to a motion for summary judgment. Moreover, the motion was not

supported by the full evidentiary record or the same facts as the motion for summary judgment.

The Second Circuit and others have consistently held that, because a motion to dismiss is not a decision on the merits of a complaint, the denial of a motion to dismiss does not preclude a later grant of summary judgment on the same grounds. *Nobel Insurance Co. v. City of New York*, 2006 WL 2848121, *4 (SDNY 2006). "[A]s a ruling in favor of a plaintiff on a motion to dismiss does not address the merits of such an action, such ruling will not preclude a subsequent ruling in favor of a defendant on the same issue on a motion for summary judgment following discovery." *Id.* (quoting *Dawes v. Leonardo,* 885 F.Supp. 375, 376-77 (NDNY 1995)); *See also, Day Spring Enterprises, Inc. v. LMC International, Inc.*, 2004 WL 2191568, * 13 (WDNY 2004); *Rivervale Realty v. Town of Orangetown, NY*, 816 F.Supp. 937, 946 n.9 (SDNY 1993); *McKenzie v. Bellsouth Telecom, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) (prior ruling on motion to dismiss by Sixth Circuit Court of Appeals did not establish law of the case for purposes of summary judgment); *Golden Pacific Bancorp v. Federal Deposit Ins. Corp.*, 2003 WL 21496842, *5 n.14 (SDNY 2003); *See also, Torres v. Stewart*, 263 F.Supp.2d 463, 466 (D. Conn. 2003) (where the Court does not consider the record as a whole on a motion to dismiss, the Court is not precluded from reviewing the Respondents' arguments on a motion for summary judgment) *see also*, *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002).

This is also consistent with the precedent of this Court. In *United States v. SCRAP*, 412 U.S. 669, 687 (1973), for example, the Court affirmed the lower court denial of appellants' motion to dismiss on the basis of standing and found that the pleadings alleged sufficient facts to show that the petitioners had standing to bring their claims. *Id.* at 687. The Court held, however, that the allegations contained in the pleadings could have been challenged on a motion for summary judgment. *Id.*; *see also*, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) (identifying the difference between a motion to dismiss pursuant to FRCP 12(b)(6) and a motion for summary judgment pursuant to FRCP 56(c)); *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996).

At the motion to dismiss stage, the Court reviewed only the complaint to determine whether it was sufficient to raise allegations of due process violations. *Palkovic II*, 281 Fed. Appx. at 66. In its review of the motion to dismiss, the Second Circuit found that the District Court's dismissal of the complaint rested on the conclusion that "the repeated initiation of 3020-a proceedings did not violate Palkovic's procedural due process rights because the third hearing was not a 'sham' or *pro forma* hearing." *Id.* at 65. Looking only at the four corners of the complaint, and not at the documents, affidavits and testimony that make up the full record, the Second Circuit found that the Petitioner's allegations that the School District repeatedly initiated "§ 3020-a proceedings until they achieved the results they

desired" and the allegations that there was no new evidence to show that her mental state had deteriorated were enough to state a claim for relief that was "plausible on its face" that she had been deprived of a meaningful hearing. *Id.* The Court indicated, however, that it was not considering the merits of the Petitioner's case. *Id.*

The Petitioner has cited no authority in support of her claim that the Second Circuit's decision finding that she had alleged sufficient facts in her complaint to support a plausible claim for relief somehow precludes a later award of summary judgment to the Respondents. The Petitioner erroneously contends that there were no countervailing facts alleged by Respondents that were not alleged in the complaint. This is simply untrue. The Petitioner's complaint alleges and infers that the third 3020-a was merely a rehashing of evidence that was presented at the first 3020-a where the Hearing Officer found that there was insufficient evidence of Petitioner's mental incompetence, based on the evidence that was before him.

The allegations of the complaint infer that the Respondents used the same evidence of mental instability before Hearing Officer Campagna as they had against Hearing Officer Markewitz. (A 69). It was for this reason that the Second Circuit, in reversing the District Court's decision granting the motion to dismiss, found that Petitioner had alleged sufficient facts to show a violation of due process because she

was allegedly not given a meaningful hearing. *Palkovic II,* 281 Fed. Appx. at 66.[2] The Respondents disputed these allegations in their answer. The full evidence showed that she was given a meaningful hearing and that her due process rights were not violated.

II. THE SECOND CIRCUIT CORRECTLY FOUND THAT THE PETITIONER WAS GIVEN A FAIR AND MEANINGFUL HEARING

The Second Circuit correctly determined that the Petitioner had been granted a meaningful hearing prior to her termination. The Petitioner contended that this hearing was not meaningful because the School District did not show that her mental state had changed from the time of the first 3020-a hearing until the time of the third hearing. Rather, the Petitioner contended that the School District merely presented the same evidence of incompetence that was submitted to Hearing Officer Markewitz who, Petitioner argues, found that she was mentally competent. Because new and different evidence of

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[2] Contrary to the Petitioner's contentions, the panel which reviewed the motion to dismiss did look to whether the Petitioner had alleged that she was not provided a meaningful hearing during the third 3020-a proceeding and found that her complaint raised such a claim. Thus, this panel did not reject the District Court's and second panel's determination that the third 3020-a hearing was not a sham as Petitioner claims. (Pet. 29).

Petitioner's mental state was produced at the third hearing, however, there was no violation of Petitioner's due process rights.

Procedural due process requires that the Petitioner be given notice and an opportunity for a meaningful hearing prior to the deprivation of a significant property interest. *Karapova v. Snow*, 497 F.3d 262 (2d Cir. 2007); *Catanzaro v. Weiden*, 140 F.3d 91, 94 (2d Cir. 1998) (citing *Parrat v. Taylor*, 451 U.S. 527, 540 (1981)). If a protected property interest exists, the Court must determine whether the School District deprived the Petitioner of that interest without due process. *Strong v. Bd. of Educ. of the Uniondale Free Sch. Dist.*, 902 F.2d 208, 211 (2d Cir. 1990). Due process is a flexible concept that requires only such procedural protection as the particular situation allows. *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

There is no dispute that, as a tenured teacher, Petitioner had a property interest in her continued employment with the School District, *DeMichele v. Greenburgh Central School District*, 167 F.3d 784, 789 (2d Cir. 1999). The evidence in the record below shows that she was given a meaningful hearing prior to her termination. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Montefusco v. Nassau County*, 39 F.Supp.2d 231 (EDNY 1999).

As this Court held in *Fuentez v. Schevin*, 467 U.S. 67, 79-80 (1972), procedural due process requires that parties whose rights are to be affected are entitled to

notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* According to the Court, the purpose of allowing a party to be heard before she is deprived of a meaningful right is to minimize against substantively unfair or mistaken deprivations of property. Thus, "when a person has an opportunity to speak up in his own defense and the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Id.*

Contrary to Petitioner's argument, there was no requirement or mandate by the Second Circuit that the School District show that her mental state had changed from the time of Hearing Officer Markewitz's decision and Petitioner has cited no other authority to support this claim. The one case upon which the Petitioner relies, *People v. Leonard III*, 148 AD2d 75 (3d Dept. 1989), is inapplicable. That case determined that in a habeas corpus proceeding for voluntary confinement in a mental health facility, the State was not permitted to re-institutionalize a patient on the same grounds that were presented or available at a prior unsuccessful hearing. *Id.* Both the standard and the facts are inapplicable here. The School District did not reinstitute the charges that were brought before Hearing Examiner Markewitz, nor did they seek to terminate her based on the proof that was presented to him. Rather, the School District brought charges against her based on new psychiatric reports,

evaluations and testing, as well as her bizarre behavior which supported the psychiatrists' findings.

Although the Second Circuit and District Court did not require School District to show that the Petitioner's mental health had changed from the first hearing to the third, these Courts held that the School District was required to show that there was some additional evidence to suggest that she was mentally incompetent that was not available at the first. (SPA 37). The Courts appropriately found that the School District produced such evidence through the reports of Drs. Kronick and Smith and the Petitioner's behavior during the summer of 2000. (SPA 39-41).

The Petitioner conceded that the School District's request that she undergo an examination with Dr. Stephen Kronick pursuant to Section 913 of the New York Education Law was not a violation of due process. (SPA 18-20). New York law provides that teachers in New York schools are required to submit to an examination to determine their physical and mental fitness to perform their duties. New York Education Law § 913; *Dobeson v. Board of Educ. of City Sch. Dist. of New York*, 192 AD2d 399 (1st Dept. 1993). Courts in the Second Circuit have recognized a school district's right to require such an examination where a school district has reason to question the Petitioner's fitness to teach. *Strong*, *supra*, at 212; *Garguil v. Tompkins*, 704 F.2d 661, 668 (2d Cir. 1983) *vacated on other grounds*, 465 U.S. 1016; *Stamos v. Glen Cove S.D.*, 78 Fed. Appx. 776, 778 (2d Cir. 2003)

(unpublished opinion) (Plaintiff's suspicions about the school district's requirement that she undergo an examination under 913 are not sufficient to "undermine a statutory mandate allowing the District to request the examination.")

If Petitioner was unhappy with the School District's requirement that she attend this examination, she was required to appeal the determination pursuant to New York CPLR Article 78. *See*, *Brodsky v. Bd. of Educ. of Brentwood Union Free S.D.*, 64 AD2d 611 (2d Dept. 1978). Since she was given a sufficient post deprivation remedy, her required attendance at this examination was not a denial of due process. *Harris v. Mills*, 572 F.3d 56 (2d Cir. 2009).

Once the School District obtained reports from Drs. Kronick and Smith opining that the Petitioner lacked the mental capacity to teach, the School District was equally justified in commencing an additional 3020-a proceeding to protect the safety of its students. Section 913 of New York's Education Law specifically provides that the reports of such examinations may be considered in evaluating the service of the person who was examined. Moreover, the School District's rights in this regard have been recognized by New York Courts. *See*, *Fitzpatrick v. Bd. of Educ. of Mamaroneck Union Free School Dist.*, 96 AD2d 557, 558 (2d Dept. 1983) (upholding the Petitioner's termination based on psychiatric reports that he suffered a serious personality disorder). In fact, had the School District not commenced this proceeding, it may have been derelict in its duty to

protect the children within its School District. *Fitzpatrick, supra* (to hold that the school district was not permitted to terminate a teacher for a finding of mental incompetency "would be to force the board of education to continue to employ a teacher who has been found, after a hearing, to be incompetent.").

A. The Reports of Dr. Kronick And Dr. Smith Were Not A Rehashing Of The Evidence Before Hearing Officer Markewitz

Contrary to the Petitioner's contentions, Drs. Kronick and Smith did not merely rephrase the findings of Drs. Lilliquest and Wapner in the first 3020-a. Drs. Kronick and Smith both testified that, although they reviewed the reports of the School District's experts in the first 3020-a, Drs. Lilliquist and Wapner, as well as those of the Petitioner's experts Dr. Thalman and Dr. Tassinari, they did not base their opinions on those reports. Rather, they based their opinions of Petitioner's mental competence on their own examinations and testing of Petitioner. Dr. Smith and Dr. Kronick were concerned with, among other things, Petitioner's incoherent or disconnected responses to certain questions and her refusal to take some tests. (A. 491-92; A. 506; A. 462-67).

Dr. Kronick thoroughly described his evaluation of the Petitioner and his interview with her and found that she lacked insight into her behaviors and that

she lacked the ability to take any measure of responsibility for her actions. (A. 463). She refused to accept any responsibility for her past behaviors. He also found that her demeanor was overly guarded and suspicious. (A. 463-64). For these reasons, he requested that she undergo additional psychological testing with Dr. Smith. (A. 464).

Dr. Kronick testified that as a result of his examination and the psychiatric testing of Dr. Smith, he felt that Petitioner had a personality disorder and an inflexible pattern of dealing with others. He believed that this condition caused her significant impairments in her functioning as a teacher. He believed that her rigid and inflexible personality style made her perceive all difficulties, even those for which she is somewhat responsible, to be caused by others around her. (A. 466).

While Dr. Kronick did testify that Petitioner suffers from a longstanding personality disorder which had been present for several years, he based that conclusion not on the evidence that was presented to Officer Markewitz, but on his own analysis of the Petitioner, the testing and the testing performed by Dr. Smith. (A. 470-77). These facts were not listed in the Petitioner's complaint.

Similarly, Dr. Smith relied upon the results of his own testing and examination of the Petitioner to support his opinion. (A. 509-11). Dr. Smith went into detail about the tests he administered and the results he obtained. (A. 485-91). These tests took several

hours over a period of two days to perform. He further testified that Petitioner became very upset and refused to take one test, the Thematic Apperception Test (TAT). (A. 488). As a result of this testing, Dr. Smith formed the conclusion that the Petitioner suffered from a personality disorder in which she saw herself as blameless. He found that her reactions were rigid, harsh and highly suspicious. She had tendencies to deny, repress and somatize her own behaviors or contributions to situations. (A. 488, 400). As a result of this testing, he found that she was mentally unfit to teach. (A. 400, 491).

The reports and testimony of Drs. Smith and Kronick show that they were not merely restating the same conclusions that were made in the earlier proceeding. The previous psychiatrists based their results on the Petitioner's alleged behaviors in 1996 and 1997. (A. 329-33). The testing and evaluation of Drs. Kronick and Smith, on the other hand, were based upon their evaluations of Petitioner in 2000. They relied on prior reports for history, but not for their own conclusions. None of these facts or conclusions are described in the Petitioner's complaint.

This is not a case where the School District merely produced expert opinion based on the same set of facts that were presented to the first hearing officer. Thus, Petitioner's reliance on *State v. Block*, 296 Wis. 2d 935, 724, N.W.2d 273 (Wis. Ct. App. 2006) and the cases cited at footnote 5 of her brief is misplaced. These cases involve situations where a

criminal defendant is seeking to overturn a conviction against him or where a party to a civil lawsuit is seeking relief from a judgment. *Id.*; *see also, United States v. Joseph J.*, 40 Fed. Appx. 494 (9th Cir. 2002) (defendant seeking withdrawal of guilty plea is not entitled to introduce expert witness opinion that was available at the time of plea); *Stewart v. Angelone*, 1998 WL 377895 (4th Cir. 1998) (claim of defendant who was convicted of the brutal murder of his wife and son that his expert psychologist was inefficient was inapplicable at habeas corpus proceeding where it was not raised in trial or direct appeal thereof); *see also, Weetman v. Sullivan*, 877 F.2d 20, 23 (9th Cir. 1989) (disability claimant attempted to introduce inconsistent evidence of disability after examiner made his decision).

Here, the School District was not seeking to collaterally overturn the Markewitz decision. Rather, the School District brought different charges based on the reports of Dr. Kronick and Dr. Smith in 2000 and the Petitioner's bizarre behavior toward the witnesses and individuals in 2000. This evidence which was not the same as that which was not considered by Officer Markewitz, sufficiently established that Petitioner suffers from a personality disorder such that she is mentally unfit to teach.

B. Petitioner's Behavior Toward The Witnesses In 2000 Was Further Evidence Of Her Personality Disorder That Was Not Presented To Officer Markewitz

The District Court and Second Circuit also correctly held that the Petitioner's behavior toward the witnesses during the summer of 2000 was further evidence of Petitioner's mental incompetence that was not available to Hearing Officer Markewitz. The undisputed evidence before Hearing Officer Campagna showed that the Petitioner approached many witnesses and individuals she believed had made disparaging comments about her in the past and demanded that these individuals recant their statements about her.

The testimony at the third hearing of Doris Oakley, Charlene Foster, Maureen Johnson, Muriel Lanciault, Barbara Ulitsky, Sharon Lawrence, Patricia Smart and William Thomson showed that Petitioner repeatedly called and contacted these individuals demanding that they retract their earlier statements against her. (A. 536-38, 541-46, 620-33, 566-67, 664-70). When she was unable to get a retraction from the individual, the Petitioner would contact the individual's family and demand their assistance in obtaining a retraction. (A. 543-42). She also demanded a retraction of a statement Charlene Foster allegedly made against her in parent-teacher conference notes several years before. When Ms. Foster refused, she

demanded that Ms. Foster speak to her husband to see if he could change her mind. (A. 541).

At times, Petitioner sought retractions of statements that were not made. For example, Ms. Smart testified that Petitioner demanded that she retract a statement that Ms. Smart had not made. (A. 664-68). When Ms. Smart would not comply, Petitioner contacted Ms. Smart's husband's business partner and demanded that he and his sons assist her in obtaining a retraction. (A. 664).

She also used deceit in an attempt to obtain a retraction. She approached Muriel Lanciault, the superintendent of a different school district, and pretended to be on special assignment so that she could obtain a piece of letterhead which contained the name of Barbara Ulitsky who was then a principal at the other school district. (A. 621). She indicated to Ms. Lanciault that she needed the letterhead so that she could have a letter written on it in order to vindicate herself of charges that were brought against her. (A. 621). Ms. Lanciault refused her request. (A. 622). When she failed to receive the letterhead from Ms. Lanciault, she approached the president of the board of education and two members of the school board, demanding letterhead with Ms. Ulitsky's name on it and accusing both Ms. Lanciault and Ms. Ulitsky of being rude and uncooperative. (A. 622).

Petitioner admitted to much of this behavior in her response to the charges against her. (A. 836-42). Although she now seeks to minimize the impact of

these statements, she did not testify in the third 3020-a proceeding and did not refute the statements of these individuals. This evidence further supported the School District's contentions and Dr. Smith's and Dr. Kronick's opinions that the Petitioner suffered from a rigid and inflexible personality disorder that affects her perception of others and herself and therefore makes her mentally unfit to teach. (A. 465-66). Indeed, both Dr. Smith and Dr. Kronick testified that this behavior was consistent with their diagnoses of the Petitioner. (A. 467, 492). It showed that Petitioner refused to accept any responsibility for her actions. Instead, she harassed and bullied witnesses into recanting statements they had made several years ago, misrepresenting herself in the process. As arbiter of the facts and law of the case, it was well within the purview of Officer Campagna to consider this evidence, in the context of the testimony of Drs. Smith and Kronick, as supporting Petitioner's mental incompetence to teach. Since this evidence was not considered by Hearing Officer Markewitz, and since this evidence supported Dr. Kronick's opinion of Petitioner's overly rigid personality disorder, it is not true, as alleged in Petitioner's complaint, that the Respondents did not produce a "scintilla of evidence that her mental state had changed." (A 69-70).

None of these facts are alleged in Petitioner's complaint. Petitioner's complaint merely states that the School District amended its charges in September 2000 to add ten charges of alleged inappropriate

behavior toward prior witnesses. (A. 65). Nowhere does Petitioner go into the detail of these witnesses' testimony, nor does she show, as stated above, how this testimony supported the diagnosis of Drs. Smith and Kronick.

Similarly, Petitioner's complaint does not detail the evaluations and testing that Drs. Smith and Kronick performed. (A. 66-68). She did not cite Dr. Kronick's testimony that he based his opinion on his own examination of the Petitioner, her inconsistent and disjointed answers, and on the testing of Dr. Smith. She does not cite the testimony of Dr. Smith that he performed several tests on Petitioner over the course of two days; that Petitioner refused to take some tests and that he did not rely on the prior evaluations or testing of Petitioner. Thus, this information was therefore not considered by the Second Circuit in *Palkovic II*.

Petitioner has shown no evidence, however, and cited no cases to support her claim that she was not given a meaningful opportunity to be heard. *Palkovic*, *supra*. Rather, in support of this position, the Petitioner erroneously relies on the case of *Carter v. Harris*, 64 F.Supp.2d 1182, 1189 (D. Ala. 1999) (Pet. 20).

The *Carter* case is easily distinguished. In *Carter*, Alabama State University failed to follow its own procedures before terminating the Petitioner. *Id*. After receiving a decision from the arbitrator which found that the Petitioner should not be terminated, the

University president, in violation of established procedures, nonetheless terminated her without indicating why he was not following the arbitrator's decision. *Id.* The president then refused to allow the Petitioner an appeal of that decision, as was also required by the University's policies. Instead the president instigated another evidentiary hearing based on exactly the same charges and evidence before a final decision had been rendered on the first one. The Court held that the University's failure to follow its own procedures rendered the second hearing a sham and was a violation of the Petitioner's due process rights. *Id.* Here, there is no allegation and no proof that the School District failed to follow the procedures of 3020-a.

The record before the Court showed that the Petitioner was given an opportunity to tell her side of the story and that Mr. Campagna was not predisposed to a certain outcome, but was willing to listen to her arguments. The fact that he disagreed with Petitioner is not a violation of due process. Thus, there is no showing that the hearing provided to Petitioner was a sham or was in violation of her due process rights. Further, Petitioner's claim that she should not have had to undergo the process at all does not implicate her due process rights. *See, Liberty Cable v. City of New York*, 60 F.3d 961, 964 (2d Cir. 1995) ("A party's due process rights are not violated when it may participate fully in an administrative agency proceeding and later seek state-court review.").

Here, there is no doubt that the Petitioner was given a full and fair opportunity to present her defense to the charges against her. She was given notice of the charges and the amended charges. She was well represented by counsel and, in fact, raised many of the same arguments below that she raises here. The Petitioner agrees that the hearing she had was not a sham and that the appropriate procedures were followed. As such, she cannot show that she was deprived of due process and the Second Circuit appropriately affirmed the District Court's award of summary judgment to the Respondents.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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